NO. 99-1185

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court of Appeals concluded that under this Court's precedents a "civil"commitment statute can be held to be punitive if a person confined under it shows by the "clearest proof" that the statute is punitive in its "effect"; held that Mr. Young had alleged facts that could meet this high standard; and remanded this case to the Federal District Court for an evidentiary hearing on this issue. The question presented by the State's petition is therefore:

Is a federal court precluded from ever considering the conditions of confinement -- no matter how onerous and longstanding those conditions may be -- in determining whether a commitment regime the legislature has labeled "civil" is instead punitive in "purpose or effect" under the Due Process, Ex Post Facto, or Double Jeopardy clauses of the Constitution?

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Constitutional Provisions Involved

In addition to the Double Jeopardy Clause of the Fifth Amendment and the Ex Post Facto Clause of Article 1, Section 10, of the U.S. Constitution cited by the state, the Due Process Clauses of the Fifth and Fourteenth Amendments are involved in this case. The Due Process Clause of the Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural Background

Mr. Young filed his petition for writ of habeas corpus in U.S. District Court in 1994, after the Washington Supreme Court upheld, with some Court-initiated amendments, the "sexually violent predator commitment" statute, RCW 71.09. In re Young and Cunningham, 122 Wn.2d 1 (1993). The District Court initially granted his petition, finding that the statute violated due process, double jeopardy, and ex post facto protections. Young v. Weston, 898 F. Supp. 744 (W.D. Wash., 1995). The state appealed to the Ninth Circuit, which, following argument, remanded the case in light of Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 139 L.Ed.2d 450 (1997). Young v. Weston, 122 F.3d 38 (9th Cir. 1997). The District Court on remand denied the petition. Young v. Weston, No. CV-94-00480C (W.D. Wash. Feb. 10, 1998). Mr. Young appealed, arguing that the purpose and effect of the statute are punitive, violating due process, double jeopardy, and ex post facto protections. The Ninth Circuit remanded the case to the District Court for an evidentiary hearing on the question of whether the conditions of Mr. Young's confinement rendered the statute punitive as to him.

Young v.Weston, 192 F.3d 870 (9th Cir. 1999).[1] The state is

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[1] The Court noted at the outset of its opinion that Mr. Young had challenged "the interpretation and implementation of the statute" as violative of due process. The punitive

seeking certiorari in this Court.

Factual Overview

Andre B. Young was to have completed serving his prison sentence for rape in October, 1990. One day before his release, the state obtained a warrant to arrest and transport him to a different prison to be held for prosecution as a sexually violent predator under RCW 71.09. Despite numerous requests to be allowed to come to court in person to face the charges against him, to seek pre-trial release, and to make various motions, Mr. Young was not permitted to come to court until four months later.2 At trial, the state was required to prove a prior conviction or charge of a crime of sexual violence. The state fulfilled this requirement by presenting proof of the conviction for which he had just completed his sentence. Following trial, Mr. Young was committed to the Special Commitment Center (SCC) at Monroe Reformatory. The

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conditions of confinement engage due process protections, as well as double jeopardy and ex post facto protections, as the state's punishment of a person committed for treatment violates due process. The Court's decision to remand can be sustained on that basis alone.

2 The Ninth Circuit noted that "Washington's refusal to allow Young to appear before any court for four months--where those facing commitment under Washington's regular civil commitment statute are entitled to a *prompt* probable cause hearing--may be an indicia of the statute's punitive purpose or effect." Young v. Weston, 192 F.3d 870, 876-877 [emphasis in original].

commitment is indefinite.3

During the pendency of this proceeding, the SCC facility was moved to the McNeil Island Penitentiary. In both locations, SCC has been wholly located within the perimeter of a Department of Corrections-run prison.

Several SCC inmates brought suit under 42 U.S.C. Sec. 1983, resulting in a jury verdict finding unconstitutional conditions. The federal court issued an injunction in June, 1994. SCC is subject to a contempt order for failure to provide constitutionally adequate treatment, and it remains under U.S. District Court supervision. Turay v. Seling, C-91-664 WD.

Judge William Dwyer found on October 1, 1997, that "The central need is to translate into reality a program that exists on paper. What is required is not just a plan but a reality -- the genuine providing of adequate mental health treatment to all SCC residents willing to accept it." Turay v. Seling, Order, Oct. 1, 1997, Appendix A. On November 15, 1999, Judge Dwyer found that "[T]his basic requirement is

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3 To obtain release, Mr. Young must persuade a court that "facts exist that warrant a hearing on whether the person's condition has so changed that he is safe to be conditionally released to a less restrictive alternative or unconditionally discharged." He is not entitled to be present at the "show cause hearing" on this issue. If the court finds that probable cause exists to believe that the person has so changed that he is not likely to engage in predatory acts of sexual violence if released, then the court sets a hearing, at which the burden of proof is on the state. RCW 71.09.090.

still unmet." Findings of Fact, Conclusions of Law, and Order re Motions heard October 19-21, 1999 (filed Nov. 15, 1999), at 14, Turay v.Weston, Appendix B. He found that "the prison's influence remains pervasive and damaging" to the SCC. Id., at 12. Noting that "Compliance should have been complete long ago", the court found that SCC had "intentionally disregarded the injunction's requirements." He found the SCC administrators in contempt of court. Id., at 18,20,22.

During Mr. Young's more than nine years at SCC, SCC staff have made derisive comments based on race, strip searched inmates, have requested inmates to harm other staff members, have provided pornography to inmates. No transition, work release, or aftercare program has been implemented at SCC, despite universal agreement by treatment experts that such programs are essential to treatment. See, Detention of Campbell, 139 Wn.2d 341,369-370(1999),Sanders, J., dissenting.

REASONS WHY THE PETITION SHOULD BE DENIED

Respondent Mr. Young respectfully requests that this Court deny the petition for writ of certiorari. The Court of Appeals relied on this Court's reasoning in Kansas v. Hendricks, supra, in holding that conditions of confinement under an allegedly non-punitive statute may render the statute punitive in effect. The state is mistaken in claiming that the Court of Appeals "departs from" the holdings of Hendricks and Hudson v. United States, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) by reviewing actual conditions of

confinement. Petition at 9. The state's interpretation of Hudson as applied to this case conflicts with a long history of decisions in this Court accepting "as applied" challenges. As the Court of Appeals properly concluded, the actual conditions can demonstrate the punitive purpose and effect of the statute. It therefore is appropriate to remand the case to the district court for an evidentiary hearing on the actual conditions.

The state does not contest that civil committees are entitled to treatment. Petition, 19. And it has not argued here that the conditions at SCC are not punitive. The state cites no authority for its proposition that a state can be divided into administrative and legislative sections for purposes of applying constitutional protections. Petition at 17. At the oral argument in the Ninth Circuit, counsel for the state, Assistant Attorney General Sarah Sappington, told the Court that if the state put a person committed under RCW 71.09 in a general prison population at McNeil Island with no treatment, it still would be civil commitment if the statute on its face said it was civil commitment. See Appendix C. Under the state's argument, such state action would not violate due process, double jeopardy, and ex post facto provisions. Petition at 17, 19.

The evidentiary hearing ordered by the Ninth Circuit has not yet occurred. The case should take its course in the District Court, and a full factual record be completed before

any review in this Court. This case is not ripe for review.

Finally, even should the Court accept the state's argument, that no as-applied challenge is possible in a double jeopardy and ex post facto claim, no such argument exists with regard to the due process claim herein. As the Court of Appeals' decision is sustainable on that ground, this Court should deny review.

(A) This Court Examines the Actual Conditions to Determine Whether A Statute is Punitive in Purpose or Effect

Justice Thomas wrote for the Court in Hendricks, supra.:

> Although we recognize that a "civil label is not always dispositive," Allen, supra, at 369, we will reject the legislature's manifest intent only where a party challenging the statute provides "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil." United States v. Ward, 448 U.S. 242, 248-249 (1980).

This Court was concerned about the actual conditions of confinement in Kansas:

> And the conditions surrounding that confinement do not suggest a punitive purpose on the State's part....Because none of the parties argues that people institutionalized under the Kansas general civil commitment statute are subject to punitive conditions, even though they may be involuntarily confined, it is difficult to conclude that persons confined under this Act are being "punished."

138 L.Ed 2d. At 516.

Justice Kennedy, concurring in Hendricks, noting that the Court's opinion denying the ex post facto challenge "concerns Hendricks alone",described exactly the situation in this case:

> If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were

> adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish....
>
> On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it.

138 L. Ed 2d at 521.

In Kansas v. Hendricks,supra, this Court looked not only at the language of the statute but also at the actual conditions of confinement in upholding the constitutionality of the Kansas sexual predator law:

> The State has represented that an individual confined under the Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution.

138 L.Ed.2d at (emphasis added).[4] The Ninth Circuit, in Young, relied on this language in remanding the case to District Court to determine whether Mr. Young has been incarcerated under punitive conditions. 192 F. 3d 870, 874.

The Hendricks court reaffirmed that if a statute's purpose and effect are punitive, then double jeopardy, ex post facto, and due process are implicated. ("Clearest proof" of punitive purpose and effect will negate "civil" label. 138 L.

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[4] The state misrepresents the Hendricks opinion when it claims that "consistent with its later-issued opinion in Hudson, the Hendricks Court limited its ex post facto and double jeopardy holdings to an examination of the language of the Kansas Act, rather than the conditions actually experienced by Mr. Hendricks." Petition, 15. This is clearly not the case.

Ed 2d 501, 515.) The Court found that in Kansas, "the conditions surrounding that confinement do not suggest a punitive purpose on the State's part." *Id.*, at 515-516. The *effect* of the statute cannot be measured simply by looking at its face. Actual conditions clearly are relevant.5

The Court of Appeals in Mr. Young's case was doing exactly what this Court has prescribed, inquiring about the effect of the statutory scheme. It recognized the constitutional dimensions of differing facts. It noted Mr. Young's allegations:

> Mr. Young is subject to conditions more restrictive than those placed either on true civil commitment detainees or even those placed on state prisoners;
>
> Young has been subject to such conditions for more than seven years [now nine years];
>
> The Special Commitment Center is located wholly within the perimeter of a larger Department of Corrections facility and relies on the Department of Corrections for a host of essential services, including library services, medical care, food, and security;
>
> The conditions of confinement at the Special Commitment Center are not compatible with the Washington statute's treatment purposes;
>
> The conditions and restrictions at the Special Commitment Center are not reasonably related to a legitimate non-punitive goal;
>
> and The conditions of confinement at the Special Commitment Center do not comport with substantive due process....

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5 The majority's review of actual conditions was accompanied by that of the four dissenters in Hendricks who wrote: "...when a State decides offenders can be treated and confines an offender to provide that treatment, but then refuses to provide it, the refusal to treat while a person is fully incapacitated begins to look punitive." Dissent, 138 L. Ed 2d at 533.

> Court-appointed Resident Advocate, psychologist Stanley Greenberg, concluded in his final report, "[b]ecause the SCC [Special Commitment Center] hasn't fundamentally changed over so many years, even with a court injunction, I have come to suspect that it is designed and managed, either overtly or covertly, to punish and confine these men and women to a life sentence without any hope of release to a less restrictive setting";
>
> The Department of Corrections staff's role in running the Special Commitment Center had increased: daily Department of Corrections security "walk-throughs"; continued Department of Corrections responsibility for Special Commitment Center residents' medical care (including requirements that residents be shackled and dressed in prison jumpsuit when taken to the Washington State Reformatory infirmary); and continued Department of Corrections responsibility for meals;
>
> Special Commitment Center residents were housed in units that were, according to Special Master Janice Marques, "clearly inappropriate for individuals in a mental health treatment program";
>
> and There were still no certified sex-offender treatment providers at Special Commitment Center.
>
> Young, 192 F.3d at 192, footnotes omitted.

The Court properly concluded that facts relating to these allegations should be determined by the District Court.

B. Hudson's Review of "Penalizing Mechanisms" Does Not Affect this Court's Reliance on Conditions of Confinement in Hendricks, Reno v. Flores, and Schall in Determining Whether Legislation is Punitive

Several months after Hendricks, in Hudson v. United States, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997), the Court rejected a double jeopardy challenge to an allegedly disproportionate civil penalty, holding that it was error for the lower court to "'asses[s] the character of the actual sanctions imposed,'...rather than, as Kennedy [v. Mendoza-Martinez]6 demanded, evaluating the statute 'on its face' to

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6 372 U.S. 144, 9 L.Ed.2d 644, 83 S.Ct. 554 (1963). It is

determine whether it provided for what amounted to a criminal sanction." 118 S.Ct. 488 at 494.

The state contends that Hudson v. United States, supra, requires that a court may not look at the actual effect of a statute, but only the language on its face, to determine constitutionality under a double jeopardy analysis. This distorts the holding of Hudson and ignores many decisions of this Court which are at the bedrock of constitutional analysis.

Hudson did not purport to reverse Hendricks; the majority in Hudson did not mention Hendricks. The Ninth Circuit properly analyzed the impact of these two cases, and no further review is required.

The key distinction between the two cases lies in Hudson's discussion of the kind of "actual sanction imposed." Hudson noted that for purposes of determining whether a law was civil or criminal for double jeopardy analysis, "[a] court must first ask whether the legislature, 'in establishing the **penalizing mechanism**, indicated whether expressly or impliedly a preference for one label or the other." 118 S.Ct. at 493

important to note that this Court in Kennedy wrote: "Here, although we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive."

[emphasis added].7

A different question was presented in Hendricks: what restraints can be imposed by the State in the context of civil commitment, where no "penalizing mechanism" of any kind is allowed?8

This Court in Hudson emphasized a number of factors which supported its conclusion that the penalty in question was civil. The authority was vested in administrative agencies, not a court. Money penalties and debarment were not historically viewed as punishment. Also, the sanctions imposed did not involve an "affirmative disability or restraint," which Mr. Young's incarceration certainly does.

The distinction can be gleaned from two cases cited in Hudson. The Court cited United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), "relying on the historical support for the notion that [in rem] forfeitures are civil and thus do not implicate double jeopardy." 118 S.Ct. at 495. It further quoted Flemming v. Nestor, 363 U.S. 603, 617, 4 L.Ed.2d 1435, 80 S.Ct. 1367 (1960), in noting that

7 Quoting United States v. Ward, 448 U.S. 242, 248-249 (1980).

8 The state misunderstands the issue when it says "The Double Jeopardy Clause cannot operate as a sliding scale protection depending on the severity of the punishment." Petition, 16. In a civil commitment, there can be no punishment. If the conditions are punitive, double jeopardy, ex post facto, and due process protections all are violated.

debarment from a profession is "'certainly nothing approaching the 'infamous punishment" of imprisonment.'" 118 S.Ct. at 496.

Ursery found it "absolutely clear" that forfeiture had never been regarded as punishment. 518 U.S. at 291. Flemming found that "[n]o affirmative disability or restraint is imposed" in the denial of social security benefits to deported Communists. It is clear from this pair of cases, as it is from Hendricks and Hudson, that this Court views forfeitures, debarments, and fines in a vastly different light from affirmative restraint such as incarceration.9

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9 Recent federal caselaw leads to the same conclusion. Application of Hudson almost exclusively has been restricted to cases of fines, forfeitures, and debarments.)In S.A. Healy v. Occupational Safety & Health Review, 138 F.2d 686, 688 (7th Cir. 1998, the court found that civil fines imposed under the Occupational Safety and Health Act were non-punitive under the double jeopardy clause, holding:

> The exaction is financial...and money penalties have not been viewed historically as criminal punishment. Hudson, --U.S. at --, 118 S.Ct. at 495. Moreover, as in Hudson the penalty is assessed by the executive branch of the government, which is incompatible with the idea that the sanction is "criminal."

See United States v. Beaty, 147 F.3d 522, 525 (6th Cir. 1998) (taxes on wagering); United States v. $273,964.04 U.S. Currency 164 F.3d 462, 465 (9th Cir. 1999) (forfeiture). Beaty also cites the "affirmative disability" or "infamous punishment" of Nestor v. Flemming in finding no double jeopardy violation.

The only applications of Hudson to actual confinement known to respondents are United States v. Mayes, 158 F.3d 1215 (11th Cir. 1998); and New Jersey v. Black, 153 NJ 438, 710 428, 432 (1998), both finding double jeopardy analysis inapplicable to the loss of "good time" pursuant to prison discipline. Both cases analyze loss of good time as an administrative act pursuant to lawfully imposed punishment,

Further support for this distinction is found in Schall v. Martin, 467 U.S. 253, 269, 81 L.Ed.2d 207, 104 S.Ct. 2403 (1984), where the Court, relying on Kennedy, found specific conditions relevant to an "as applied" constitutional challenge to a juvenile pre-trial detention statute:

> Of course, the mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment. It is axiomatic that "[d]ue process requires that a pretrial detainee not be punished. [cite omitted] Even given, therefore, that pretrial detention may serve legitimate regulatory purposes, it is still necessary to determine whether the terms and conditions of confinement under ss 320.5(3)(b) are in fact compatible with these purposes. Kennedy v. Mendoza-Martinez, 372 U.S. at 168-169, 9 L.Ed.2d 644, 83 S.Ct. 554.

Schall makes clear that Hudson's reliance on the "face" of the statute, rather than its application, is inapplicable to statutes permitting incarceration:

> It may be, of course, that in some circumstances detention of a juvenile would not pass constitutional muster. But the validity of those detentions must be determined on a case-by case basis. Section 320.5(3)(b) is not invalid 'on its face' by reason of the ambiguous statistics and case histories relied upon by the court below.

467 U.S. at 273 [emphasis added]. The Court concluded that pretrial detention of juveniles in the particular case at hand was non-punitive since "[t]he conditions of

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rather than as separate punishment. No one challenged the State's power to impose a criminal sentence on either Mayes or Black. By contrast, there are no permissible grounds for any sanction in the case at hand.

confinement...appear to reflect the regulatory purposes relied upon by the State." Id. at 270.

Similarly, in Reno v. Flores, 507 U.S. 292, 123 L.Ed.2d 1, 16-17, 113 S.Ct. 1439 (1993), the Court found that a statute permitting the detention of illegal immigrants did not constitute punishment, but only upon satisfying itself that the detention featured decent and humane conditions and an absence of "shackles, chains, or barred cells."10

Schall , Flores , and Kennedy are not double jeopardy cases. All three cases involve the definition of punishment for due process purposes. Yet Hudson relies on Kennedy in defining punishment under the double jeopardy and ex post facto clauses. Thus, "punishment" has the same definition for double jeopardy and due process purposes.

The Ninth Circuit performed the precise analysis required by Schall, Flores, and Hendricks, and found, in essence, that the conditions of confinement to which Mr. Young was subjected, unlike those in Schall, did not "appear to reflect the regulatory purposes relied upon by the State." Schall, 467 U.S. at 270. The ruling should stand.

C. This Court Historically has Reviewed the Application

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10 Although the Court characterized the challenge to the statute as a facial one, it was able to find the Statute constitutional only after finding that the government had ameliorated the unconstitutional conditions under which the statute had previously been applied. 123 L.Ed.2d at 16.

of Statutes to Determine Whether the Statutes Themselves were Constitutional.

The State, ignoring Schall and Flores, maintains that the Ninth Circuit's ruling represents a radical departure from settled constitutional doctrine, suggesting that it is improper to examine "the actions of an executive branch administrative agency." Petition at 17. The State cites no authority and is manifestly wrong. For at least 115 years, in cases reviewing the constitutionality of statutes under doctrines as disparate as equal protection, establishment of religion, and the "takings" clause of the Fifth Amendment, this Court has "referred not only to the language of the statute but also to the manner in which it had been administered in practice." Bowen v. Kendrick, 487 U.S. 589, 601, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988).

Perhaps the best known of these cases is Yick Wo v. Hopkins, 118 US 356 (1886), where the court found that even though the language of a law was unexceptional, the fact that it was applied almost exclusively against persons of Chinese ancestry proved the law unconstitutional. The Court held:

> the cases present the ordinances **in actual operation,** and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied...with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners...by the broad and benign

> provisions of the Fourteenth Amendment.... Though the law itself be fair on its face and impartial in appearance, yet, **if it is applied and administered with an evil eye and an unequal hand**, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal protection is still within the prohibition of the Constitution.

118 U.S. at 373 [emphasis added].

In Gomillion v. Lightfoot, 364 U.S. 339 (1960), the Court found nothing facially unjust about legislation adjusting the city limits of Tuskeegee, Alabama. The Court nonetheless held that if the petitioner's allegations were proved:

> The essential inevitable effect of this redefinition of Tuskeegee's boundaries is to remove from the city all but four or five of its 400 Negro voters while not removing a single white voter or resident....
>
> It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this court must judge, and uniformly has judged, statutes that howsoever speciously defined, obviously discriminate against colored persons.

334 U.S. at 342-43. The court thereupon held the law unconstitutional under the Fifteenth Amendment. The court's warning about "specious definitions" is no less applicable to prison conditions described as treatment by the legislature.

In a series of civil rights cases preceding Brown v. Bd. of Education 347 U.S. 483 (1954), this Court again looked to the actual application of legislation to adjudge its constitutionality. In Missouri ex rel Gaines v. Canada, 305

US 337, 83 L.Ed. 208 (1938); McLaurin v. Oklahoma State Regents, 339 US 637, 94 L.Ed. 1149 (1950); and Sweatt v. Painter, 339 US 629, 94 L.Ed 1114 (1950), the Court looked beyond the language of statutes promising "separate but equal" education to African-Americans and, finding the promises unkept, invalidated the laws.

Similarly, in Grand Rapids School District v. Ball, 473 US 373 (1985), the Court overturned a statute providing public school assistance to private schools, not because of the language of the Statute, but because the evidence showed that "[f]orty of the forty-one schools at which the programs operate are sectarian in character." 473 US at 379.

As recently as 1998, the court considered the actual economic impact on employers in finding congressionally mandated health benefits unconstitutional under the "takings clause." Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998).

These cases are consistent with Schall, supra, Flores, supra, Kennedy v. Mendoza-Martinez, supra, and the case at hand. The Ninth Circuit has done nothing new or controversial. It has merely applied a well-established principle: that the application of a statute can prove intent or effect contrary to statutory language.

Hendricks, too, is consistent with this long line of cases from Yick Wo to Apfel. As the State notes, the Court

first noted that "critical language in the act itself demonstrates that the Secretary of Social and Rehabilitation Services, under whose custody sexually violent predators are committed, has an obligation to provide treatment to individuals like Hendricks." 521 U.S. at 367, quoted in Petition at 14. This language is part of the Court's facial analysis of the Kansas statute. The Court then discussed the actual conditions in the Kansas "predator" facility. See supra. This discussion constituted the Court's analysis of the Statute as applied.11

The State's analysis of Hudson would preclude all judicial review of even the most punitive legislation as long as the legislature used properly non-punitive language to mask

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11The State makes much of the fact that the Court did not "remand for additional evidence on the statute as applied" in Allen v. Illinois, 478 U.S. 364 (1986). Pet.at 15. But, unlike the case at hand, there is no indication that anyone raised an "as applied" challenge in Allen. There was thus nothing to remand. This Court nonetheless ruled:

> Petitioner has not demonstrated, and the record does not suggest, that "sexually dangerous persons" in Illinois are confined under conditions incompatible with the State's asserted interest in treatment. Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case.

478 U.S. at 373.

Allen and Young thus follow the principle set forth in Yick Wo and the other cases cited herein: that a facially constitutional statute may be unconstitutional if unconstitutionally applied.

its intent. All constitutional protections would be subservient to the legislature's aptitude for phrasing. The State's argument would thus have devastating effects not only on the continued viability of the constitution but also on legislative integrity. The Court did not allow such a result in Yick Wo, Gomillion, or Grand Rapids, and should not consider it here. The state's position would unravel more than a century of Supreme Court precedent in analyzing statutes as applied to individuals.

D. Statutes are Unconstitutional "As Applied" Only When their Application is Pervasively Unconstitutional

The State raises the spectre of the constitutionality of laws changing year by year as the institutions charged with applying them slip in and out of compliance with constitutional minima. Petition at 17. The State's concerns are answered by Bowen v. Kendrick, supra, an "establishment of religion" case. There, the court found that particular unconstitutional applications of a statute providing aid to private schools could be remedied without invalidating the Statute itself. The Court explained:

> This is not a case like Grand Rapids, where the challenged aid flowed almost entirely to parochial schools. In that case the State's "Shared Time" program was directed specifically at providing certain classes for nonpublic schools, and 40 of 41 of the schools that participated in the program were found to be 'pervasively sectarian'.

487 U.S. at 610-611. In other words, the Court found a

difference between pervasive and incidental unconstitutionality in the application of a statute. There is always the possibility that a previously well-maintained State institution might temporarily fall upon hard times, or, as in Hendricks, allowances might be made for an institution's inadequacies on the basis of its newness. In this case, on the other hand, the Ninth Circuit remanded for a hearing to determine whether conditions during Mr. Young's nine-year incarceration have been punitive. The difference between Hendricks and Young is the difference between Bowen and Grand Rapids: the difference between incidental and pervasive unconstitutionality.

Similarly, the possibility of an unfair civil penalty in Hudson could not overcome "the well established rule" that forfeiture is not punishment. See Ursery, supra. The historic and pervasive unconstitutionality of conditions claimed by Mr. Young under the Washington "predator" act, on the other hand, clearly overcomes any presumption that commitment is non-punitive.

E. The State Cannot Claim the Statute is Constitutional by Accusing the Executive Branch of an Unconstitutional Application of the Statute

The state warns against permitting a rogue executive branch to stymie the allegedly benign intent of the

legislature. 12 This argument was answered by this Court 119 years ago:

> Whoever, by virtue of public position under a state government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be, or the constitutional prohibition has no meaning.

Neal v. Delaware, 103 U.S. 370,397, 26 L. Ed 567, 574 (1881).

The legislature has shown than it can respond to issues at SCC when it chooses to do so. While the Federal Court Special Master and virtually all other experts have criticized SCC's failure to establish community treatment resources, the legislature in 1995 eliminated the possibility of release to less restrictive alternatives prior to in-patient commitment, making it far more difficult for residents to win conditional release of any kind. Compare previous and current RCW 71.09.020(1); 71.09.090; 71.09.092; 71.09.094; In re Young, 122 Wn.2d 1 (1993); In re Brooks, 94 Wn.App. 716 (1999); In re

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12 The state cites no authority for its claim that its attorney general can defend the legislature against depredations by the executive branch. The legislature has the power to sue a recalcitrant executive to require that its statutes be implemented, State ex. Rel Grieve v. Martin,63 Wn. 2d 126, 385 P.2d 846 (1963), but the legislature has not done so here. See also, Dept. of Commerce v. US House of Representatives, 525 U.S. 316, 142 L.Ed 2d 797, 119 S.Ct.765 (1999). The Attorney General and the Department of Social and Health Services are servants of the same sovereign: the State of Washington. State v. Dupard, 93 Wn. 2d 268, 273, 609 P.2d 961 (1980), Thompson v. DOL, 138 Wn. 2d 783, 794, _P2d_(1999).

Turay, 139 Wn.2d 379, 986 P.2d 790 (1999). The legislature has done nothing, meanwhile, over the past ten years to address the inadequacies of the SCC treatment program, the prison-like conditions of confinement, or the unavailability of actual community-based aftercare.13 Not even a federal injunction demanding reform of SCC, Turay v. Weston, supra, has spurred the legislature to change.

F. Contrary to the State's Argument, Continued Federal Oversight of the SCC Militates Against Review .

Quoting the Washington Supreme Court, the state contends that the federal court oversight of SCC provides inmates an adequate remedy. Petition at 18, citing In re Turay, 139 Wn.2d 379,420,986 P.2d 790(1999). This abdication of state responsibility weakens the state's case. The State fails to show why certiorari is appropriate at this time.

The State's response to the federal court injunction to date discourages any such optimism. The state has failed to comply with the Court order in Mr. Turay's case for five years,and is in contempt for failure to comply with the injunction. See Order re Motions heard October 19-21, 1999

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13 Under RCW 71.05.025, persons committed under the Involuntary Treatment Act, the traditional civil commitment statute, have access to all of the community treatment services offered under RCW 71.24, the Community Mental Health Services Act. By contrast, the legislature has failed to establish any community services for persons committed under RCW 71.09.

(file Nov. 15, 1999), Turay v. Weston, Appendix B. The federal court in Turay v. Weston may sanction the State of Washington thousands of dollars. Mr. Young's right to be free of successive punishments cannot be subject to the State's ability to absorb sanctions. The Court of Appeals ruling on his habeas petition should stand.

To argue that Mr. Young has a meaningful remedy in an action pursuant to 42 U.S.C. Sec. 1983, while refusing to comply with the orders issued in that action, is to mock the rights sought to be protected.

G. Double Jeopardy and Ex Post Facto Protections Apply Because the Washington Statute Requires a Predicate Element of a Prior Conviction or Criminal Charge

The state misapprehends the law when it argues that double jeopardy and ex post facto protections do not apply to Washington's statute because it does not address the "same offense". Petition, 20-21. It argues that Hendricks is controlling in its finding that the Kansas law does not "make commission of a specified 'offense' the basis for invoking the commitment proceedings." Petition, 21, citing 521 U.S. at 370. In effect, the state argues, the prior conviction is used only for evidentiary purposes, not as a predicate for the "predator" prosecution. Pet. p.21. The state is in error.

The Hendricks court found that in Kansas, the prior conviction was not an "element" of the charge of being a sexually violent predator. 521 U.S. at 370. So if conditions

were punitive, which the Court found they were not in Kansas, the double jeopardy clause would not apply.

In Washington, the prior conviction of a sexually violent offense is in fact an element to be proven, a predicate to the prosecution. In Mr. Young's case, the prosecutor's charging document alleged that Mr. Young had been convicted of a specific sexually violent offense, the sentence for which was about to expire. Prosecutor Petition, Appendix D. At trial, the court instructed the jury that to find Mr. Young to be a sexually violent predator they must find "each of the following elements" beyond a reasonable doubt, including that he had been "convicted of a crime of sexual violence: specifically, of an act defined in Title 9A RCW as rape in the first degree...." Instruction No. 8, Appendix E.

Unlike the situation described by the Court in Hendricks, where "past behavior...is used...solely for evidentiary purposes", 521 U.S. at 371, the Washington prosecution may not occur without proof beyond a reasonable doubt of the element of a prior conviction of a sexually violent offense. Clearly, the prior conviction is a predicate of the prosecution, and both double jeopardy and ex post facto protections apply.

The Washington courts are clear that the prior conviction is a predicate for a "predator" prosecution. One man, Jerry Sharp, obtained a dismissal of the "predator" prosecution against him when his prior conviction was reversed on appeal.

Assistant Attorney General Sappington provided a declaration in Mr. Sharp's case, stating that when the court of appeals reversed Mr. Sharp's convictions for sexually violent offenses, "the State was required by law to dismiss its petition." Appendix F. The trial court dismissed the predator petition against him because the court no longer had jurisdiction, the Court of Appeals having reversed the convictions. Order, Appendix G.

In Detention of Twining, 77 Wn. App. 882, 888, 894 P.2d 1331 (1995), the Washington Court of Appeals noted that "the Legislature requires that the suspected sexual predator ...must have been convicted or charged with a crime of sexual violence. RCW 71.09.020(1)."

Double jeopardy and ex post facto protections are engaged by the Washington practice, which resulted in Mr. Young's incarceration as a "predator" based on the same offense for which he was imprisoned, where the state maintains a "commitment" facility which in fact is punitive.

H. The State's Concern About "National Implications" Is Misplaced

The state suggests that the Court of Appeals decision casts doubt on the validity of laws in thirteen other states. Petition at 19. This case involves only Washington State, and by its terms, only Andre Young. The State's argument presumes widespread defiance by the States of the constitutional

mandate to provide treatment. This Court cannot assume that thirteen other states also are refusing to provide constitutionally required treatment, or that courts reviewing those statutes would fail to follow the law.[14]

I. The Conflict Between The Ninth Circuit and the Washington Supreme Court is Not A Reason to Grant Review in this Case

The state argues that this Court should grant review because the Washington Supreme Court has taken a different view of the issues than the U.S. Court of Appeals, citing In re Turay, supra. Petition at 10. Supreme Court Rule 10 (a) does list as a reason to consider certiorari that " a United States court of appeals ...has decided an important federal question in a way that conflicts with a decision by a state court of last resort...." That reason alone applied to habeas corpus cases would result in the Court taking review of every decision in which a District Court grants an evidentiary hearing which the state court denied. Rule 10 also states: "A petition for a writ of certiorari will be granted only for compelling reasons."

The state does not mention the companion case to Turay,

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[14] The state also is in error when it suggests that traditional civil commitment laws are threatened by an as-applied analysis. Petition, 20.The reality is that if a person either is not mentally ill or the facility to which he is civilly committed is punitive, then the detention is not permissible as civil commitment. Foucha v. Louisiana, 504 U.S. 71, 118 L.Ed.2d 437, 112 S.Ct 1780 (1992)

Detention of Campbell, 139 Wn.2d 341 (1999). In Campbell ,the court barely acknowledged Turay with a single "but see" reference, 139 Wn.2d 341,348, and then undertook its own review of the actual conditions of confinement. The court wrote:

> To the extent Campbell's claim is proper, he must show by "'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' that the proceeding be civil...."

citing Allen v. Illinois, 478 U.S. 364,369 (1986), 139 Wn. 2d at 349. In a footnote, the Court referred to the Ninth Circuit decision as deciding "nothing other than petitioner there is entitled to an evidentiary hearing on his claims." 139 Wn.2d 341, 349, fn 2.

While the Turay court found that the conditions of confinement did not implicate the legality of the commitment order, the Campbell decision, issued the same day as Turay, entertained the argument. In Mr. Young's case, review in this Court should not occur before full development of the facts in the District Court.

J. The Court of Appeals Decision Can Be Affirmed on Due Process Grounds

Even should this Court adopt the state's argument that an as-applied challenge can never be heard to raise double jeopardy and ex post facto issues, there is no such claim regarding due process. If the conditions are punitive, then the commitment violates due process by imprisoning Mr. Young

under a "treatment" scheme which in fact is punishment. Reno v. Flores, supra; Zinermon v. Burch, 494 U.S. 113, 125, 108 L.Ed.2d 100, 110 S.Ct. 975, 983 (1990). The Ninth Circuit's opinion can be upheld on due process grounds, and this Court need not accept review. See Blum v. Bacon, 457 U.S. 132, 137,fn.5, 72 L.Ed 2d 728, 102 S.Ct. 2355(1982): "It is well accepted, however,...that an appellee may rely upon any matter appearing in the record in support of the judgment below." The Blum Court noted that it can affirm a judgment on a different legal basis than the court below adopted.

K. This Case is Not Ripe for Review

Finally, this case is not ripe for review. As this Court wrote in Texas v. United States, 523 U.S. 296, 140 L.Ed 2d 406, 410-411, 118 S.Ct. _ (1998): "A claim is not ripe for adjudication if it rests upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" [citation omitted.] Also, this Court has written: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable". Spector Motor Service, Inc. v. McLaughlin, 323 U. S. 101, 105 (1944), cited in Dept. of Commerce v. US House of Representatives, 525 U.S. 316, 142 L.Ed 2d 797, 119 S.Ct.765 (1999).

Conclusion

This Court should deny the petition for writ of certiorari.

Respectfully submitted this 17th day of February, 2000.

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